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No. 79-1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LETTS INDUSTRIES, INC.,
Petitioner,
vs.
RICKY WIERSEMA,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

RESPONDENT'S MEMORANDUM OF LAW IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

Contrary to Petitioner's assertion that there is a dearth of meaningful precedent establishing guidelines for Rule 41(a)(2)[1] dismissals, the questions presented by

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[1] Rule 41(a)(2) of the Federal Rules of Civil Procedure reads in its entirety as follows:

> (2) *By Order of the Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall

(cont'd. on following page)

Petitioner have already been answered by this Court. Moreover, the issue itself is not one susceptible to the formulation of a uniform rule for universal application; and, in consequence, the implementation of the Rule is best left to the discretionary decision of the District Courts supervised by the Circuit Courts of Appeal. None of the traditional bases for the granting of a writ of certiorari exist in this case. No Constitutional issue is raised; nor does this case present problematic questions of a recurring nature; nor those which have proven particularly troublesome to the Circuit Courts of Appeal over time. No conflict of Circuits is asserted.

For these reasons, it is respectfully submitted that certiorari is improvident in the context of the case at bar.

ARGUMENT

The Petition for Writ of Certiorari in this case should be denied for the following reasons:

1. In the case at bar, the Petitioner has not raised any new or novel questions of law, nor any question of law not heretofore comprehensively reviewed and answered in *Ex Parte Skinner & Eddy Corp.*, 265 U.S. 86 (1923), and *Jones v. Securities and Exchange Commission*, 298 U.S. 1 (1935).

(cont'd. from preceding page)

> not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

In *Ex Parte Skinner & Eddy Corp., supra*, 265 U.S. at 93-94, Chief Justice Taft spoke for a unanimous Court when he wrote:

> At common law a plaintiff has an absolute right to discontinue or dismiss his suit at any stage of the proceedings prior to verdict or judgment, and this right has been declared to be substantial. . . .
>
> It is ordinarily the undisputed right of a plaintiff to dismiss a bill in equity before final hearing. *McGowan v. Columbia River Packers' Assoc.*, 245 U.S. 352, 358, 62 L. Ed. 342, 345, 38 Sup. Ct. Rep. 129. In *Pullman's Palace Car Co. v. Central Transp. Co.*, 171 U.S. 138, 146, 43 L. Ed. 108, 112, 18 Sup. Ct. Rep. 808, this statement of the rule in *Detroit v. Detroit City R. Co.*, 55 Fed. 569, was approved: "It is very clear from an examination of the authorities, English and American, that the right of a complainant to dismiss his bill without prejudice, on payment of costs, was of course except in certain cases. *Chicago & A. R. Co. v. Union Rolling Mill Co.*, 109 U.S. 702, 27 L. Ed. 1081, 3 Sup. Ct. Rep. 594. The exception was where a dismissal of the bill would prejudice the defendants in some other way than by the mere prospect of being harassed and vexed by future litigation of the same kind."
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> * * *
>
> The right to dismiss, if it exists, is absolute. It does not depend on the reasons which the plaintiff offers for his action. The fact that he may not have disclosed all his reasons, or may not have given the real one, cannot affect his right. [citations omitted]

The District Court and the Seventh Circuit, on review, found on the facts, that the Petitioner had failed to show any particularized prejudice and that the litigation had not proceeded so far that it would be unreasonable to terminate it and recommence it in a separate forum.[2]

2. Of necessity, the determination of a motion to dismiss pursuant to Rule 41 of the Federal Rules of Civil Procedure is confined to the broad judicial discretion of the District Courts because "[n]o one single factor controls . . . [and] each case must be examined in its own factual circumstances." *SEC v. Everest Management Corp.*, 466 F. Supp. 167, 171 (S.D. N.Y. 1979) [applying Rule 41(b)]. In order to constitute an abuse of that discretion, there must be shown "arbitrary action by failure to apply the appropriate equitable and legal principles to the established or conceded facts and circumstances." *Home Owners Loan Corp. v. Hoffman*, 134 F. 2d 314, 317 (8th Cir. 1943).[3] Indeed, Rule 41(a)(2) permits voluntary dismissal even *during trial*, " 'where the court believes that although there is a technical

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[2] "A Court of law, such as this Court is, rather than a Court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949); *Hoffa v. United States*, 385 U.S. 323, 348 (1966) (Douglas, J. concurring)

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[3] Only recently, in *Curtiss-Wright Corp. v. General Electric Co.*, — U.S. —, 64 L. Ed. 2d 1, 12 (1980), this Court emphasized in interpreting Rule 54(b) that "the discretionary judgment of the District Court should be given substantial deference . . ." In a similar balancing context, the Court went on to say, in a vein equally applicable here, "because the number of possible situations is large, we are reluctant either to fix or sanction narrow guidelines for the district court to follow." 64 L. Ed. 2d at 13. The same conclusion should obtain here.

failure of proof there is nevertheless a meritorious claim.' " *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 217 n.5.

Petitioner does not provide a compelling demonstration of "arbitrary action" in either court below; rather, in balancing the legal and equitable factors inherent in the determination of a Rule 41(a)(2) Motion, the District Court and the Seventh Circuit, on review, simply found the balance lay in Respondent's favor.

3. As emphasized by Professor Moore in his treatise, the test is whether the defendant in the court below will suffer "substantial prejudice." 5 Moore, *Federal Practice* (2d Ed. 1979), Paragraph 41.05[1], pp. 41-73. Petitioner's arguments in the case at bar clearly fail to meet this benchmark. Moreover, it is clear that the prejudice contemplated must be articulated with particularity, not merely alleged generally, and must be more than merely present in some degree to justify appellate intervention.

4. None of the traditional premises on which certiorari has been considered appropriate historically exist in the case at bar. That is, Petitioner does not claim that the decision of the Seventh Circuit in the instant case is in direct conflict on an important question, much less demonstrably or irreconcilably so, with any cited opinion of this Court, nor any of another Circuit. *N.L.R.B. v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951). There is no suggestion that the issue is a recurring one which will trouble other circuits or that if modification is believed needed (which Respondent does not concede), it will not come of its own force through *en banc* consideration within the Seventh

Circuit.[4] The nature of the issue forecloses the possibility of the pronouncement of an uniform rule on the point and that aspect of the case strongly suggests that Petitioner's Statement of Reasons for Granting the Writ harken more to the writ of error under the former practice[5] than to modern use of the writ of certiorari. On this point the members of this Court have frequently reiterated, formally and informally, that "the perceived correctness of the judgment" *Ross v. Moffitt*, 417 U.S. 600, 616-617 (1974), below is not, alone, a sufficient basis for review. J. Harlan, *Manning the Dikes*, 13 Record of N.Y.C. B.A. 541, 551 (1958); Vinson, *Address Before the American Bar Association*, 59 S. Ct. v, vi (1949).

It is not claimed that, in the case at bar, the Seventh Circuit failed to correctly apply a prior decision of this Court through error or oversight, or that it misperceived, misapplied or misconstrued some prior opinion of this Court. It is not suggested that any prior precedent is ripe for reexamination or that it is now timely to review a question expressly reserved for future consideration. There is no asserted conflict

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[4] To the extent Petitioner implies a conflict between the two cited decisions of the Seventh Circuit, it was incumbent upon the Petitioner to assert the conflict and to seek resolution of the issue through *en banc* review since "it is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (*per curiam*). Petitioner did not allege internal conflict as a basis for granting its Suggestion for Rehearing and Rehearing En Banc; and, it is noteworthy that *not a single member* of the Seventh Circuit, in active service, voted to grant a rehearing of the matter.

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[5] Stern & Gressman, *Supreme Court Practice* (5th Ed. 1978), § 4.1, pp. 254-257.

between a State court of last resort and a Federal Court on either a Federal or nonfederal question. Moreover, there is no reason given why the issues in this case would impact on any group or class of persons beyond the parties in this case. Clearly, no question of Constitutional magnitude is involved.

Again, Petitioner seems intent upon resurrection of the writ of error, rather than properly seeking a writ of certiorari. Such a course would be disastrous since it would take this Court away from its Constitutional mission and motivate the additional resort to certiorari as a means of final review of the facts and an additional discussion of specific facts or issues resolved below adversely to the petitioning party. *United States v. Johnston*, 268 U.S. 220, 227 (1925). The torrent must seem great enough for petitions brought on established grounds without the claimed "non-analysis"[6] of a Court of Appeals to be added to the list. The question presented is not identical with, nor similar to, an issue in a case now pending before the Court.

5. It is respectfully submitted that the Court of Appeals was completely correct in determining that the doctrine articulated in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) is not germane to the case *sub judice*. When a defendant is sued in the forum in which it maintains its principal place of business, a presumption arises that that is a convenient forum. 1 *Restatement of Conflicts* 2d (1971) § 84, p. 253. As pointed out by the District Court in *Swanson v. Badger Mut. Ins. Co.*, 275 F. Supp. 544, 548 (N.D., Ill. 1967), the fact that a defendant has chosen to do business in the particular District

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[6] Petition for Writ of Certiorari, p. 7.

reinforces the conclusion that there is not inconvenience of sufficient weight to justify a change in venue. And, in consideration of venue questions, it is not for the defendant to rely on the inconvenience to the plaintiff or to the plaintiff's witnesses to support its bid for change of venue. *Holiday Rambler Corp. v. American Motors Corp.*, 254 F. Supp. 137, 139 (W.D. Mich. 1966). Moreover, the Petitioner has totally failed to satisfy the test of "actual hardship" under the doctrine. *See, e.g., Burrington v. Ashland Oil Company*, 356 A. 2d 506, 509 (Vt. 1976); *Radigan v. Innsbrook Resort & Golf Club, 150* N.J. Super. 427, 375 A. 2d 1229, 1231 (1977) (*per curiam*).

But to state these arguments is to make clear that the issue of venue, if pertinent at all, is better left to adjudication and review by the Michigan Courts, rather than by this Court. Petitioner does not make any claim that it would not, or could not, receive a fair hearing on this issue, or on the merits, from the Michigan courts.

6. There is no basis for believing that the lower Courts are not competent to dispose of future questions arising under Rule 41(a)(2) in the absence of further guidance from this Court. Indeed, the parameters of the Rule seem well-established. *Harvey Aluminum, Inc. v. American Cyanamid Co.*, 15 F.R.D. 14, 18 (S.D. N.Y. 1953); *Jackson v. New York & Cuba Mail S.S. Co.*, 18 Fed. R. Serv. 41 a. 22, Case 1 (S.D. N.Y. 1953); *Klar v. Firestone Tire & Rubber Co.*, 14 F.R.D. 176 (S.D. N.Y. 1953); *Grivas v. Parmello Transp. Co.*, 207 F.2d 334 (7th Cir. 1953).

The instant case is simply one which does not merit plenary consideration by this Court.

CONCLUSION

The Petition for writ of certiorari addressed to the Seventh Circuit United States Court of Appeals should be denied.

Respectfully submitted,

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